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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1416

TRANS WORLD AIRLINES, INC. AND AMERICAN AIRLINES, INC.,

Petitioners.

vs.

ANNE B. ZIPES, PATRICIA A. SANTINI, PAMELA J. DAILING, DARLENE PRESTON, BONNIE PULSKAMP, SUSAN PRASCIUNAS, MARSHA JIMERSON, PHYLLIS STILL, ELISABETH KORENGOLD, CHERYL ROSSI, AND AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Trans World Airlines, Inc. and American Airlines, Inc. respectfully pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered December 21, 1973 in four consolidated cases numbered 72-1335, 1336, 1399, and 1503. A separate petition for a writ of *certiorari*, seeking review of the same judgment, was filed in Case No. 73-1240 in this Court on February 12, 1974, *Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO, Petitioner* v. *Anne B. Zipes et al., Respondents.*

The Court of Appeals' opinion, not yet reported, is in Appendix A to this petition.

This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1). This petition is being filed within 90 days after December 21, 1973, the date of the Court of Appeals' judgment.

QUESTIONS PRESENTED

1. Did a labor union, which was a statutory representative of employees with conflicting interests and which brought class actions on their behalf under Title VII of the 1964 Civil Rights Act, have authority to negotiate a binding settlement of Title VII claims and remedies with the employer subject to court approval under Rule 23(e) of the Federal Rules of Civil Procedure?

2. Was a class action seeking remedies under Title VII of the 1964 Civil Rights Act not within subdivision (b)(2) but within subdivision (b)(3) of Rule 23 of the Federal Rules of Civil Procedure?

STATUTORY PROVISIONS INVOLVED

Excerpts from the Railway Labor Act (45 U. S. C. 151 *et seq.*) and Title VII of the Civil Rights Act of 1964 (42 U. S. C. 2000e *et seq.*) and the entire Rule 23 of the Federal Rules of Civil Procedure are printed as Appendices B, C, and D.

STATEMENT OF THE CASE

The two petitioner airlines are air carriers subject to the Railway Labor Act.* The union that has filed a separate *certiorari* petition, Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO, was and is the certified bargaining representative under the Railway Labor Act for thousands of stewardesses acting as flight attendants in the employ of the airlines.

After Title VII of the 1964 Civil Rights Act** became effective in July 1965, almost 600 stewardesses of the two airlines were terminated for pregnancy or related grounds pursuant to an established practice (II Supp. App. 163, 289). In June 1970 the union filed charges with the Equal Employment Opportunity Commission under Title VII against both airlines claiming the practice was unlawful sex discrimination. The union's charges named terminated stewardesses of both airlines as representative class members (I *Id.* 115-122), some of whom had filed grievances under the labor agreements (II *Id.* 172, 242). The EEOC later notified the union it could institute court actions under § 706(e) of Title VII (I *Id.* 135,136).

Two Federal District Court actions, one against each airline, were filed in August 1970, alleging the pregnancy practice violated Title VII (I Supp. App. 1-11). The union and five stewardesses were plaintiffs in the TWA complaint, and the union and 12 stewardesses in the American Airlines' complaint. Each complaint alleged the union was "a labor union and a representative of employees as defined in the Railway Labor Act". Each complaint stated it was brought "pursuant to Rule

* 45 U. S. C. 151 *et seq.* § 201 of the act so provides. See Appendix B, p. A15, for excerpts from the act.

** 78 Stat. 253; 42 U. S. C. 2000e *et seq.* See Appendix C, p. A17, for excerpts.

23(b)(2)" of the Federal Rules of Civil Procedure on behalf of all stewardesses, employed after the Civil Rights Act, who had been or would become pregnant. Prayers for relief included a declaration of rights, an injunction, a "mandatory injunction" for "affirmative action" to eliminate the effects of the violations, back pay, costs, and attorneys' fees. The airlines' answers (I *Id.* 12, 17) denied the class action allegations and alleged the pregnancy practice was not unlawful sex discrimination under the act; was based on economic, medical, and operational considerations that were described in detail; and was a "bona fide occupational qualification reasonably necessary to the normal operation" of the airlines' business under § 703(e) of Title VII.

In October 1970 both airlines and the union amended their labor agreements to eliminate pregnancy as a ground for termination and to allow maternity leave and subsequent return to work (I Supp. App. 126-34).

In July 1971 the airlines and union officials entered into settlement agreements covering the claims of the terminated stewardesses (I Supp. App. 33, 37, 44, 48). The agreements provided that terminated stewardesses would be placed on a preferential hiring list to give them reemployment rights to fill vacancies; they would retain their seniority on the date of termination; and they would have maternity leave if pregnant on reemployment (I Supp. App. 44, 48). The agreements provided they would become effective only on final judgment approving them and dismissing all other claims with prejudice.

On July 16, 1971 the District Court entered orders directing a hearing to be held on the compromise on August 30; finding the action "properly maintained as a class action"; defining the class to consist of terminated stewardesses; and ordering a notice to be given them (I Supp. App. 27). Notices explaining the compromise, sent to 240 class members by American Airlines and 346 class members by TWA, stated that court approval of the compromise would bind all class members and bar further action against the airlines (I *Id.* 30-2, 41-2, 52). In

August 1971 the Equal Employment Opportunity Commission filed a motion for leave to intervene in opposition to the compromise, primarily on the ground of the inadequacy of the notice (I Supp. App. 38-9). On the District Court's denial of the motion, the EEOC appealed to the Court of Appeals for the Seventh Circuit, which stayed the compromise hearing pending the appeal. In January 1972 the Court of Appeals affirmed the District Court's denial of intervention, *Air Lines Stewards and Stewardesses Association, Local 550* v. *American Airlines,* 455 F. 2d 101 (C. A. 7, 1972).

In February 1972 a new notice for a hearing in March, ordered by the District Court, was mailed to class members (I Supp. App. 55, II *Id.* 189,342). A terminated American stewardess, Darlene Preston, wrote American class members, stating her dissatisfaction with the compromise and asking them to return forms setting forth their views (I *Id.* 99,102; II *Id.* 186). She also filed a new class action in the same District Court, charging the union with breach of its duty of fair representation (I *Id.* 60). A terminated TWA stewardess, Anne B. Zipes, wrote TWA class members that TWA had no defense to the claims; stated her opposition to the compromise for not providing seniority since termination and also back pay; and requested the return of a form to that effect (I *Id.* 104-5). She also, by her attorneys, filed objections to the compromise and the union's representation of employed and terminated stewardesses, claiming they had conflicting interests and that the class action should be under subdivisions (b)(2) and (b)(3) of Rule 23 (I *Id.* 78-87). On March 6 a California attorney filed a notice on behalf of six stewardesses who had filed a class action under Title VII in July 1971 against American Airlines in the United States District Court, Central District of California (I *Id.* 73). The notice claimed these stewardesses had "opted out" of the class in these present cases.

Hearings on the settlement were held in the District Court between March 10 and 17, 1972 (II Supp. App. 141-522).

Counsel for the union and other plaintiffs testified that, under the settlement, all terminated stewardesses could return to work whether they had voluntarily resigned, resigned by coercion, or been terminated for violation of a rule prohibiting concealment of pregnancy; the return would be to the base of their choice regardless of where terminated; they would retain their termination seniority; the main concession to the airlines was the dismissal of the claim for back pay; and without the settlement it would take five years to litigate the cases to a conclusion because of the many different factual situations involved in determining individual remedies (II *Id.* 155-7, 168-9). Of nine stewardesses testifying in opposition to the compromise, some indicated their unwillingness to return to work and all objected that the compromise failed to include "full" seniority and back pay to the time of rehiring (II *Id.* 183-191, 212-7, 226, 230).

The District Judge's oral decision on March 17, 1972 (II Supp. App. 500-3) noted the difference between termination on pregnancy and on marriage, which had been involved in a prior case he had decided*. After discussing the issues of seniority and back pay, he concluded the compromise was "excellent" because it would return the stewardesses to work immediately. He overruled all objections and denied the objectors' motion to realign the class members and create a (b)(3) class in addition to the (b)(2) class under Rule 23. Orders found the class actions to be under Rule 23(b)(2); held plaintiffs to be "adequate representatives" of the class of terminated stewardesses; approved the compromise and held it binding on all class members (I Supp. App. 88-9). The Preston action filed against the union in the same court was dismissed (I *Id.* 93).

On appeals by objecting stewardesses, the Court of Appeals' opinion in December 1973 (Appendix A of this petition) reversed the orders approving the compromises in the two actions

* His holding that the rule terminating a stewardess on marriage was unlawful sex discrimination was affirmed in *Sprogis* v. *United Air Lines*, 444 F. 2d 1194 (C. A. 7, 1971).

against the airlines; held the union had no authority to represent the class of terminated stewardesses and settle their rights under Title VII; ruled the actions should have been treated as (b)(3) class actions to allow class members to exclude themselves from the class. The remanding provision of the opinion (p. A14) directed the District Court to permit one or more named plaintiffs or class members to replace the union as the representative of the class; to create sub-classes if it appeared desirable for adequate representation; to send notices giving class members the opportunity to exclude themselves from the class; and to proceed with the litigation to a conclusion unless a settlement was approved by the court. The judgment dismissing the Preston action was reversed.

The respondents named in this petition, in addition to the union, are stewardesses who filed objections in the District Court and appealed to the Court of Appeals.

REASONS FOR GRANTING WRIT

There are unusually strong reasons for the exercise of this Court's power of review on the two separate questions stated in this petition. The questions in the petition of the stewardesses' labor union are too narrow to present adequately the problems created by the Court of Appeals' decision.

The basic policy in favor of prompt disposition of litigation has already been defeated in this case. In July 1971 the airlines and the union negotiated a settlement, subject to court approval, of the remedies of almost 600 terminated stewardesses in class actions under Title VII of the Civil Rights Act. The District Court approved the settlement in March 1972. Appeals by some objecting stewardesses, sustained in the Court of Appeals in December 1973, have resulted in a big setback that reverses the District Court's approval of the settlement and remands the litigation to its June 1971 status.

This is not because the settlement was found unfair. The Court of Appeals, without discussing the fairness of the settlement, nullified it on two grounds. First, that the union had no authority to negotiate the settlement because the stewardesses had conflicting seniority interests. Second, that the class action, treated throughout the litigation as within subdivision (b)(2) of Rule 23 of the Federal Rule of Civil Procedure, was within subdivision (b)(3) so that class members were denied a right to exclude themselves from the class. The decision on these grounds, which are reflected above in the two "Questions Presented" and below in Points I and II, destroys a long established function of labor unions and ignores the rationale of Rule 23, as this petition demonstrates. The decision will greatly prolong this litigation. It will produce confusion and delay in much Title VII and other federal litigation, particularly in administering "the big case".

The first question, whether a labor union has authority to negotiate a class action settlement in Title VII cases subject to court approval, is "an important question of federal law which has not been, but should be, settled by this court." (Rule 19(b) of this Court, third clause).

The second question, involving the proper classification of class actions and their binding effect, is of equal importance for decision by this Court, since it affects class actions in all kinds of federal litigation, not merely under Title VII. The Court of Appeals' decision on this second question conflicts with decisions of Courts of Appeals of the Fourth, Fifth, and Eighth Circuits* (Rule 19(b), first clause).

I.

THE DECISION BELOW FAILED TO GIVE EFFECT TO A UNION'S REPRESENTATIVE AUTHORITY TO MAKE A SETTLEMENT IN LITIGATION UNDER TITLE VII AND RULE 23

The Court of Appeals' opinion applies a conclusive presumption. The conflicting seniority interests among stewardesses are held to destroy the union's authority to make a binding settlement though approved by the District Court. The starting point of the court's reasoning is the union attorney's admission that the seniority granted terminated stewardesses in a settlement would be detrimental to the seniority of the employed stewardesses (p. A7). The defect in the union's power is so extreme that it is held *per se* unlawful. The factual adequacy of the union's authority was expressly adjudicated when the settlement and the union's authority were approved after a contested hearing in the District Court.** The Court of Appeals thus conclusively

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* See below, p. 33.

** The District Court's adjudication of the adequacy of a class representative under Rule 23 is a matter of judicial discretion, reviewable only for abuse. 7 Wright & Miller, *Federal Practice and Procedure*, § 1765 at 623.

presumed that the union's authority was invalid as a matter of law even though seniority was involved in only one of the issues in the litigation.

The Court of Appeals concedes that the union, as a certified collective bargaining representative under the Railway Labor Act, may represent antagonistic interests in making binding settlements under many decisions of this Court (pp. A8-10). But this federal substantive law is held not to apply. The employee's right to redress under Title VII of the 1964 Civil Rights Act is said to be "individual" *(Id.)*. Since that would prevent any settlement of Title VII remedies on a collective basis, it is inconsistent with the court's remanding direction that a class representative chosen by the District Court may make an appropriate settlement (p. A14). Also, the union's "adequacy as a representative party" and its "unique authority to compromise the rights of its members" are said not to exist "in a class suit when such rights do not arise out of collective bargaining agreements" (p. A11). The union's disqualification is thus based on the nature of Title VII remedies and Rule 23 of the Federal Rules of Civil Procedure. The court below thus refused, in a class action under Title VII, to apply the basic provisions of federal law that authorize a union to represent conflicting seniority interests and favor the settlement of employment disputes.

A. Union Had Authority Under Federal Law to Represent Conflicting Seniority Interests in Negotiating Settlement, and Airlines Were Required to Negotiate with Union

The Court of Appeals' opinion greatly underestimates the purposes, meaning, and effect of Railway Labor Act provisions concerning the settlement of disputes and the legal relationships among the union, employees, and the carrier.*

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* See Appendix B, pp. A15-6, for excerpts from Railway Labor Act.

The Railway Labor Act's express provisions require air carriers and union representatives to negotiate and encourage them to make binding settlements of disputes despite conflicting interests among employees. The act's first operative provision requires carriers and employees to "exert every reasonable effort" to make agreements "concerning rates of pay, rules, and working conditions" and to "settle all disputes, whether arising out of the application of such agreements *or otherwise*" (§ 2 First, 45 U. S. C. 152 [emphasis added]). Disputes are required to be considered, not in individual dealings with employees, but "in conference between representatives designated and authorized so to confer . . . by the carrier or carriers and by the employees thereof interested in the dispute" (§ 2 Second). The employees' "representative" must be chosen by the "majority" of the "craft or class of employees" (§ 2 Fourth).

The specific meaning of these general provisions is indicated by illustrative decisions in which this Court has emphasized the extremely strong public policy in favor of union authority to negotiate the settlement of controversies involving conflicting interests of employees.

The statutory direction to the carrier to "treat with the representative so certified as the representative of the craft or class" (§ 2, Ninth) requires the carrier not merely to meet with the union but "to make reasonable efforts to compose differences —in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First". *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 548 (1937).

The union is not only authorized, but required, to represent craft or class members with conflicting interests and whether or not they are union members. The leading case of *Steele* v. *L. & N. R. Co.*, 323 U. S. 192 (1944), found the word "representative" in the act "plainly implies that the representative is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent" (p. 199). § 2 Second of the act, requiring carriers to bargain with the chosen repre-

sentative, "operates to exclude any other from representing a craft" (p. 200) and the designated representative is "responsible" for "those who are not members of the represented organization, as well as those who are members" (p. 201). This Court went so far in *Steele* as to say that Congress in the Railway Labor Act "has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents" (p. 202). A "corresponding duty" was also held to exist. The opinion said that Congress had intended to impose on the representative "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them". But this duty, it was said, does not bar the representative "from making contracts which may have unfavorable effects on some of the members of the craft represented" (p. 203).

A union's authority to make a binding settlement of ten employees' back pay claims, though limited in a first opinion as involving mere "grievances", was held sustainable absent contrary proof in a second opinion on rehearing, *Elgin, Joliet and Eastern Ry. Co.* v. *Burley*, 325 U. S. 711 (1945) and 327 U. S. 661 (1946). The first opinion indicated a union had exclusive authority to make a binding settlement of a "major" dispute but not a "minor" one, i.e., a grievance (325 U. S. 724-5). Justice Frankfurter's dissent for four Justices contended the union had binding authority over grievance settlements. On rehearing, granted after *amicus* briefs stated that settled labor practice was invalidated by the first opinion, the second majority opinion emphasized that the Railway Labor Act "imposes correlative affirmative duties upon the carrier, the collective agent and the aggrieved employee to make every reasonable effort to settle the dispute"; and said it would be inconsistent for the act to require the carrier and the union to negotiate concerning a settlement "while withholding power from them to make that settlement effective finally as against the employee" (327 U. S. 665). The case was remanded for factual deter-

mination of the employees' contentions that the union lacked authority to represent them.

The settlement of conflicting seniority interests by a union, the very matter here held to be beyond the union's authority in a class action under Title VII, was generally sustained in *Ford Motor Co.* v. *Huffman*, 345 U. S. 330 (1953). Citing *Steele*, the opinion explained that the union had a "statutory obligation to represent all members of the appropriate unit" (p. 337) and stressed the likelihood of seniority conflicts among represented employees (pp. 338-9):

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees . . . The complete satisfaction of all who are represented is hardly to be expected . . . Differences in wages, hours and conditions of employment reflect countless variables. Seniority rules governing promotions, transfers, lay-offs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences . . ."

Another union settlement of a dispute over conflicting seniority interests was sustained in *Humphrey* v. *Moore*, 375 U. S. 335 (1964), where one union representing the employees of two merged companies entered into an agreement fixing the relative seniority rights of the two employee groups. A state court held the agreement invalid because of "antagonistic interests of two sets of employees represented by the same union advocate" (p. 341). Reversing, this Court said that the duty of fair representation was not breached when the union had taken "a good faith position contrary to that of some individuals whom it represents" and "in supporting the position of one group of employees against that of another" (p. 349). The opinion explained the public interest in the union's negotiating authority despite the conflicts between different groups of employees:

> "Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process,

> so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. ***Conflict between employees represented by the same union is a recurring fact.*** To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes" (pp. 349-50) (Emphasis added).

Two recent Court of Appeals' decisions in the Second and Fifth Circuits illustrate how far the Court of Appeals in the present case has failed to give effect to a union's authority as an employee's representative.

Pyzynski v. *New York Central Railroad Company*, 421 F. 2d 854 (C. A. 2, 1970), emphasized the strong public policy in favor of a union's power to settle even one employee's claim. The employee had been denied reemployment after an injury; had authorized the union to file a grievance proceeding, which he lost; and the union and the employer then negotiated a settlement for his return to work without back pay. He sued for back pay in a District Court, denying the union's authority to settle. The trial court's decision for him was reversed. The Court of Appeals' opinion, written 25 years after the *Burley* case, explained how this Court's decisions in the intervening years had indicated the strong reasons why a union has broad authority to represent an employee's individual interests:

> "At the time the *Burley* decisions were written the duty of fair representation had only recently been developed in *Steele* v. *Louisville & N. R. R. Co.*, 323 U. S. 192 (1944) . . . It has since been recognized that the duty of the collective representative to represent fairly all those for whom it acts is broadly applicable to all facets of the employee's relationship with his collective agent including particularly the settlement of grievances [citing cases]. This duty is enforceable in the federal courts . . . and provides a more effective means of protecting the employee against arbitrary abuses of settlement procedures than those envisaged in the *Burley* case . . . It is more realistic to require the collective agent to represent an employee's individual interests in good faith than to assume that the

> employee, *if left in control of his grievance*, can act in his own behalf to safeguard his rights." (pp. 862-3)

In *National Airlines* v. *International Association of Machinists*, 478 F. 2d 1062 (C. A. 5, 1973), an airline and a union entered into an agreement covering almost 1000 employees "entitled to reinstatement and/or back pay" because of the airline's illegal discharges after a wildcat strike. A number of employees, dissatisfied because their interim earnings were deducted from a back pay allowance, contended their collective representative had "no authority to resolve and settle individual claims for back pay". The Court of Appeals rejected this contention on two grounds. The union had "exclusive authority" to bind objecting employees because the back pay issue was "an integral part" of the discharge following the wildcat strike, which the Court characterized as "a major dispute" (p. 1065). And the employees had "allowed the company and the union to negotiate for nearly a year without registering any objections to being bound by whatever agreement was finally reached" (p. 1066) so that the second *Burley* opinion supported the binding effect of the settlement.

The federal substantive law, created by the Railway Labor Act and these court decisions, has a pervasive effect on the relationships among carriers, employees, and the employees' statutory representative. Under that law these relationships are a "continuous process", involving "day-to-day adjustments in the contract and other working rules . . . and the protection of employee rights already secured by contract". *Conley* v. *Gibson*, 355 U. S. 41, 46 (1957). The policies favoring the union's representation of conflicting interests and the settlement of disputes are so strong that they should be held to have been reversed by Congress only if required by express legislation declaratory of a much stronger contrary public purpose.

B. Congressional Intention Misinterpreted in Denial of Union Authority

(1) Use of Wrong Criterion of Interpretation

In denying the union's Railway Labor Act authority to make a court-approved settlement in this case, the Court of Appeals looks to Title VII to see if it adopts the provisions of the earlier statute. Title VII is said not to "necessarily recognize" a union's power of exclusive representation, and "policy reasons" of Title VII are said not to "militate" in favor of the same representative status for the union under Title VII that it has under the Railway Labor Act (p. A10). The Court of Appeals treats Title VII as repealing the earlier statutory authority to the extent Congress did not expressly incorporate the prior law in Title VII. The reverse reasoning process, apparently overlooked by the Court of Appeals, is required by basic decisions of this Court.

The right method, which is to see whether the new statute necessarily forbids what the earlier statute permits or requires, was explained in Chief Justice Hughes' much quoted statement in *United States* v. *Borden Co.*, 308 U. S. 188, 198 (1939). The "cardinal principle" is that "repeals by implication are not favored". When there are two acts on the same subject, "the rule is to give effect to both if possible". The Congressional intention to repeal "must be clear and manifest".* As a result, the first inquiry is whether the provisions of both acts can be given effect rather than whether the later repeals the earlier. Accordingly *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963), reversed a Court of Appeals' holding that conduct forbidden by the Sherman Act was exempted from it by the 1934 Securities Exchange Act. There being no express exemption in the later statute, the opinion of Justice Goldberg noted that "any re-

* Justice Story was quoted to the effect that there must be "a positive repugnancy between provisions of the new law and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy" 308 U. S. at 199.

pealer of the antitrust laws must be discerned as a matter of implication". "Repeal", he said, "is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes" (p. 357). See also *Federal Maritime Commission* v. *Seatrain Lines*, 411 U. S. 726, 36 L. Ed. 2d 620, 626-7 (1973).

(2) Congressional Intention in Both Railway Labor Act and Title VII Can Be Given Effect Without Destroying Union Authority to Make a Court Approved Settlement

The first relevant inquiry on the relationship of the Railway Labor Act to Title VII, whether both can be given effect, is readily answered. A union's authority under the Railway Labor Act to represent terminated stewardesses, despite the conflicting seniority interests of employed stewardesses, will further the purposes and aid the administration of Title VII. If this were not true, as the Court of Appeals apparently assumed, the next question would be whether Congress intended in Title VII to repeal Railway Labor Act provisions that granted such authority. Title VII would have such an effect only if "necessary" to make Title VII "work". It is clear that Congress did not intend such a repeal.

Title VII is a labor relations act. It recognizes the wide scope of a union's representation authority by defining it as an organization existing "for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment" (§ 701[d]). The racial, sex, or ethnic discrimination forbidden by the act is outlawed by calling it an "unfair employment practice", a term used repeatedly in the act (§ 703).* The two substantive liability issues in Title VII cases [i.e., as here, whether the airlines' pregnancy practice was sex discrimination under § 703(a) and not "a *bona fide* occupational qualification

* Quoted in Appendix C, p. A17.

reasonably necessary to the normal operation" of the airlines under § 703(e)] affected the entire "craft or class" of all the thousands of airline stewardesses and were suitable for union-management consideration and settlement. Reinstatement, seniority, and wages are rights that are remedied by the relief provisions in § 706(g) of Title VII, which authorizes the District Court to enjoin an unlawful employment practice and order "such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay." The source of these rights is the collective bargaining agreement in the case of carriers subject to the Railway Labor Act. The § 706(g) remedies were copied* by Congress from the relief provisions of § 10(c) of the National Labor Relations Act (29 U. S. C. 160(c)).

It seems likely, if not certain, that Congress did not intend to forbid unions, exercising their regular authority despite conflicting interests, to negotiate with carriers and settle Title VII claims of unlawful employment practices involving thousands or hundreds of employees. A basic provision of the Railway Labor Act directs unions and carriers to settle all disputes (§ 2 First, 45 U. S. C. 152). Unions and their attorneys are experts in the often complicated rights to reinstatement, seniority,** and back pay which, whether involved in Title VII actions or otherwise, have their origin in collective bargaining contracts. Congress would not lightly discard the use of such a large supply of expert knowledge and skill that would be beneficial in enforcing and administering the provisions of Title VII. The purposes of Title VII will be furthered if the union's statutory authority and

* See interpretative memorandum introduced by Senator Joseph Clark, 110 Cong. Rec. 7214 (1964).

** Union officials in the airline industry are particularly experienced in dealing with seniority problems, which often present great difficulties in airline mergers. See: Rosenfield, *Air Line Mergers: The Public Interest in Labor Protective Provisions*, 61 Ky. L. J. 429 (1973); Levine and Moritz, *The Resolution of Pilot Seniority Problems in Airline Merger Cases*, 24 CCH Labor L. Journal 617 (1973).

the legal principles that favor the settlement of disputes are applied in Title VII litigation. The principles of the *Steele*, *Humphrey*, and other cases noted above* can be applied easily in Title VII actions by permitting a union to make a binding settlement despite the inevitable conflicts in its statutory representation.

The safeguards against favoritism by the union to one employee group over another include, in addition to the union's liability for breach of its duty of fair representation, court scrutiny of any settlement since court approval is required when, as here, the Title VII action is a class action under Rule 23.

The benefits to be derived from the union's exercise of its representative powers in a Title VII action are illustrated by the course of these cases. Stewardesses complained to the union early in 1970 that the airlines' pregnancy practice was unlawful sex discrimination. The union, after filing charges with the EEOC and obtaining its permission, filed suit in August. In October it negotiated an amendment of the collective bargaining agreement to eliminate pregnancy as a ground for termination. By July 1971 the union and the airlines had agreed to a settlement of the rights of almost 600 terminated stewardesses. The settlement obtained their prompt return to work with termination seniority but without back pay.** The complex litigation that was avoided by this settlement was testified to at the hearing in the trial court (II Supp. App. 169). Many legal and factual uncertainties about the probable recoveries were involved in the settlement.***

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* Pp. 11-5.

** On the first appeal in these cases the Court of Appeals emphasized the policy in favor of the settlement of Title VII cases. 455 F. 2d at 109. This is not mentioned in the second opinion.

*** The District Court's approval of the merits of the settlement under Rule 23(e), reversible only for "a clear showing . . . of an abuse of discretion" [*United Founders Life Ins. Co.* v. *Consumers Nat. Life Ins. Co.*, 447 F. 2d 647, 655 (C. A. 7, 1971)] and not disturbed by the Court of Appeals, depended on the uncertainties if the litigation were contested (*Id.*). Here there was serious

Strong practical reasons make it unlikely that Congress intended in Title VII to exclude unions from the negotiation of remedies, at least in class actions. If all disputes under the act must be litigated individually to completion without union participation, proceedings under the act will be certain to be complicated and protracted. In class actions involving the entire "craft or class", ordinary representatives under Rule 23(a)(4) would be unable to act for conflicting interests. Subclasses would have to be provided with the probability that

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uncertainty that the stewardesses, who fly for only "a very short period of time" (II Supp. App. 168), would ever obtain any remedy, at least comparable to the certainty of prompt reinstatement provided by the settlement in July 1971. Recovery would be denied completely unless the airlines' pregnancy practice were found to be unlawful "sex discrimination" within the intention of Congress in § 703(a) of Title VII; rules governing the pregnancy of state employees were recently held to violate substantive due process rather than the prohibition of sex discrimination in the Equal Protection Clause, *Cleveland Board of Education* v. *LaFleur*, ... U. S. ....., 42 U. S. L. W. 4189 (Jan. 1974); and this Court's only interpretation of the sex provision of § 703(a), requiring "persons of like qualifications" to be given the same employment opportunities irrespective of sex, would not make the pregnancy practice unlawful, *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971). If the pregnancy practice were sex discrimination under §703(a), it was still not unlawful if it embodied a "bona fide occupational qualification reasonably necessary" to airline operation; the economic, medical, and operational considerations for the airlines' pregnancy practice were alleged in the answers (I Supp. App. 13-4, 18-9). The legislative history does not support a broad interpretation of the sex discrimination provisions of Title VII because sex discrimination was hurriedly inserted in Title VII on the floor of Congress without committee hearings or reports, 110 Cong. Rec. 2577, 2581, 2584, 2720 (1964). The EEOC's guidelines on sex discrimination did not originally (1965) treat the airlines' pregnancy practice as sex discrimination (30 Fed. Reg. 14926) and in fact did not set forth a policy relating to pregnancy until March 31, 1972 (37 Fed. Reg. 6835), which was after the approval of the settlement in the trial court in this litigation. There were many doubts about the likelihood of recovery of the several kinds of affirmative relief under § 706(g) by many stewardesses because of their termination for causes other than claimed sex discrimination; because of the discretion granted the trial court to order reinstatement "with or without back pay"; because of the deduction from back pay of "interim . . . amounts earnable with reasonable diligence"; and because of limitations provisions (II Supp. App. 154).

representatives would be chosen by District Court judges, as the remanding order of the Court of Appeals in this case would require. One unlawful employment practice by one employer affecting one large group of employees would produce many cases filed in many District Courts with many different results. The Court of Appeals would supplant the statutory representative elected by a majority of the craft with a representative whose choice depends on who happens to file a class action. Congress would not have intended such a result, which its prior statutes prevent, without careful provision for it in Title VII.

It is true that some provisions of the Railway Labor Act are probably affected by the provision of § 703(c) of Title VII making it an unlawful employment practice for a union to engage in specified acts of race, sex, etc. discrimination. The union's position when it is charged with unlawful discrimination would be inconsistent with its duty to represent the employees making the charges. Then, under the principle of the *Silver* case noted above,* the statutory provision for the union's authority would be held to have been impliedly repealed "to the minimum extent necessary" to make § 703(c) "work". That is not the situation here where the union filed charges against the carriers with the EEOC and then filed the two class actions against the carriers.

The Court of Appeals' opinion (p. A13), attempting to show the individuality of the employee's remedies, exaggerates the significance of a statement in the opinion on the first appeal, which was an answer to an EEOC contention. The EEOC claimed a right to intervene because § 706(a) requires it to seek to eliminate an alleged discriminatory practice by conciliation. The first opinion said this EEOC interest was insufficient to justify intervention because the employee was the "real party in interest in conciliation endeavors" and was completely free "to accept or reject the proposals of union or employer as well as the position taken by the Commission". The Congressional provi-

* P. 16.

sion for administrative conciliation indicates no intention about exclusion of the union from a settlement of a later District Court proceeding. And the reference to a union was to a respondent charged with an unlawful employment practice, not a union negotiating for an employee. The *Cox* case cited in the earlier opinion (445 F. 2d at 106 n. 10) so indicates.*

There is thus no basis in Congressional intention for the Court of Appeals' refusal to give effect to a union's representative authority in seeking class action remedies for unlawful discrimination under Title VII. The two basic statutes involved, the Railway Labor Act and Title VII, did not create exclusive legal domains. They can be well administered together. If there is any conflict between the two as the Court of Appeals loosely indicated, the provisions of Title VII should yield to the older and more comprehensive federal labor laws enacted by Congress and developed by this Court. This is because, at least with respect to the union's authority to sue and participate in litigation as a representative of employees with conflicting interests, Congress did not intend to repeal the federal law that permits and even requires such representation.

Alexander v. *Gardner-Denver Co.*, ... U. S. ....., 42 U. S. L. W. 4214 (decided February 19, 1974, while this *certiorari* petition was being written) does not hold that Congress had a contrary intention. There a single employee, claiming wrongful discharge because of racial discrimination, had been unsuccessful in an arbitration proceeding under a labor contract. He was held not to have waived his remedy under Title VII. In the present case the employees urged the union to take their claims to arbitration in early 1970 (II Supp. App. 152). That was not done. The union persuaded them to file a charge with the

* *Cox* v. *United States Gypsum Co.*, 284 F. Supp. 74 (N. D. Ind. 1968), aff'd 409 F. 2d 289 (C. A. 7, 1969), rejected an employer's contention, based on ambiguous statutory language, that its agreement to an EEOC conciliation proposal thereby barred employees from a District Court suit under § 706(g) against both the employer and the union.

EEOC, and the Title VII class actions followed. The present litigation involves, not the effect of labor law remedies outside Title VII as in the *Alexander* case, but the capacity of a federal statutory representative to exercise his function in the prosecution of District Court actions authorized by § 706(e) and (g) of Title VII.

Another contrast with the *Alexander* case is that the present case involves a class action on behalf of almost 600 terminated stewardesses brought under Rule 23 of the Federal Rules of Civil Procedure. It seems certain that the opinion in the *Alexander* case, in emphasizing the individuality of an employee's rights under Title VII, was not intended to forbid the prosecution of remedies in class actions under Rule 23. The Courts of Appeals have noted that a class action is a particularly appropriate procedure in prosecuting remedies under Title VII.* The opinion of the Court of Appeals in the present action permits the class action to continue and even indicates that the affirmative remedies of reinstatement, seniority, and back pay could be disposed of by a settlement (p. A14). If the opinion in the *Alexander* case does raise a question about the propriety of a class action or the settlement of class action claims under Rule 23(e), it is particularly important that this Court review the present cases in order to clarify the law in a very important area.

A footnote in the *Alexander* opinion** criticizes union power in stating that arbitration is a less appropriate forum for Title VII issues than the Federal Courts. These remarks do not apply to class actions in the District Court under Rule 23 where objecting employees are protected by the necessity of court approval of the settlement. Further, it is significant that Congress in Title VII, while expressly making a union liable for unlawful discrimination, did not expressly forbid it in Title VII actions

* *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496, 498 (C. A. 5, 1968); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 719 (C. A. 7, 1969).

** 42 U. S. L. W. 4220 n. 19.

to exercise its statutory powers and duties as the representative of the majority of the craft of employees.

C. Rule 23(a)(4) Does Not Forbid Union Representation of Conflicting Interests

The Court of Appeals' opinion overlooked an important distinction in the language of Rule 23(a)(4). The court held that the union's representation of conflicting seniority interests violated the requirement of subdivision (a)(4) that "the representative parties will *effectively and adequately protect the interests of the class*" (quoted p. A22, emphasis added). This provision does not specify a conflict of interests as a disqualification. A representative may act for a class with conflicting interests if he will adequately protect class interests. Congress has made the union a special statutory protector of the conflicting interests of union members with a substantive duty of fair representation of such interests, as held by *Steele*, *Humphrey* and other cases discussed above.* This special union representation satisfies the criterion of subdivision (a)(4), contrary to the Court of Appeals' ruling, unless there is proof of ineffective or inadequate class protection; and here, as explained above,** the District Court adjudicated the union's effectiveness and adequacy as a representative.

This interpretation of Rule 23 is supported by additional considerations. When the Court of Appeals stated (p. A11) that the union's adequacy as a class suit representative must be "tested and judged in the ordinary way", the court held that subdivision (a)(4) had overridden the federal substantive law that created the union's regular role. Under the Rules Enabling Act [48 Stat. 1064 (1934); 28 U. S. C. 2072] a procedural provision could not validly modify substantive federal law. See *Sibbach* v. *Wilson & Co.*, 312 U. S. 1 (1941). Rule 23

* Pp. 11-5.

** P. 9n.

should be interpreted to sustain its validity. Further, in resorting to a class action under Rule 23, the union submitted itself to judicial supervision of its performance as a representative, including the scrutiny of any settlement by reason of the requirement of court approval in subdivision (e). This, combined with the union's liability for breach of its substantive duty of fair representation, provides double assurance that the union "will effectively and adequately protect the interests of the class".

The Court of Appeals' opinion (p. A8) raises a possible violation of procedural due process, citing *Hansberry* v. *Lee*, 311 U. S. 32, 45 (1940), for a statement "that a judgment in a class action can only bind absent class members where the representative's interests coincide with those of the balance of the class". The basic due process protections of a notice* and a hearing were accorded the objectors in the present cases (I Supp. App. 55). Their attorneys (other than the union's) appeared at and participated fully in the hearings held in March 1972 (II *Id.* 141). In *Masterson* v. *Pergament*, 203 F. 2d 315, 330 (C. A. 6, 1953), *cert. den.* 346 U. S. 832, rejecting contentions that a settlement under former Rule 23(c) was invalid because of inadequate notice and the dual role of lawyers representing class members, the Court of Appeals explained that the District Judge, in granting his approval, was "a third party to the compromise" and that the objection of class members to inadequate representation at the hearing could not be sustained. Thus, in the present case, if a due process question is raised by the statutory agent's representation of conflicting employee interests, the employees are protected by the two safeguards of the union's duty of fair representation and judicial review of the representation.

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* On the first appeal the Court of Appeals' opinion, after reviewing the provisions of the July 1971 notice, later duplicated in the February 1972 notice, concluded (455 F. 2d at 108) that it "sufficiently conveyed the required information," citing *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950).

D. Airline Reliance on Union Authority

The airlines negotiated with the union and made a binding settlement in reliance on representations that the union had authority to act. The representations were made by the airlines' opponents in the litigation, the union and the stewardesses for whom it acted. The Court of Appeals, after stating that in some cases class members could so clearly acquiesce in their union's efforts that "they would be estopped" from excluding themselves from a settlement, concluded, "Nothing revealed in this record puts these cases in that posture".* This conclusion is based on a faulty analysis of the conduct by the union and its members in dealing with the carriers.

The carriers' reliance on representations of union settlement authority has been held to be an important factor in considering union authority that might otherwise be in doubt. In the second *Burley* opinion, the majority said that the employee could not "stand by with knowledge or notice of what is going on with reference to his claim", "allow matters to be thrashed out to a conclusion", "and then come in for the first time to assert his individual rights" (327 U. S. 666-7). Twenty-five years later the Second Circuit said in the *Pyzynski* case (421 F. 2d at 859-860),

> "The Burley decisions may be said to have held that a carrier may rely on the authority of a union to negotiate a conclusive settlement . . . if it can be shown either that the union acted upon a basis of actual authority, whether individually given or to be gathered from the union constitution or bylaws or from custom and usage or that the employee had notice or knowledge of the actions taken by the union in his behalf and took no steps to negate the union's authority".

In the *National Airlines* case, involving a settlement of remedies for the illegal discharge of 1000 employees, the Fifth Circuit held that 28 objecting employees, "having allowed the I. A. M.

* P. A13.

[the union] to negotiate with the result that the company bargained under the assumption that all claimants including these twenty-eight would be bound by the settlement, may not now declare that this agreement is null and void with respect to them" (478 F. 2d at 1066).

In the present controversy, the stewardesses and the union repeatedly used the processes and practices of federal labor law to pursue their Title VII remedies. In early 1970, when several terminated stewardesses took action against the pregnancy practice, they did so by filing grievances with the union, their statutory representative under the RLA (II Supp. App. p. 151). The union as their representative negotiated the dispute, unsuccessfully, with the airline employers. When the union as the stewardesses' statutory representative filed charges with the EEOC (I *Id.* 115), the EEOC authorized the union to file actions under Title VII (I *Id.* 135). In the District Court complaints filed in August 1970 the union did not sue as a person discriminated against by the pregnancy practice but as "a representative of employees as defined in the Railway Labor Act, 45 U. S. C. 151" (I *Id.* 2, 7). The union had broad authority to sue on behalf of employees on several grounds.* The settlement set aside by the Court of Appeals was negotiated

* A union has been held capable of bringing an action under § 706(e) of Title VII as a "person aggrieved", and the EEOC has authorized such suits by unions as it did in these cases. *International Chemical Workers Union* v. *Planters Mfg. Co.*, 259 F. Supp. 365, 366 (N. D. Miss. 1966); *Local 186* v. *Minnesota Mining & Mfg. Co.*, 304 F. Supp. 1284, 1293 (N. D. Ind. 1969); *Local 179* v. *Federal Paper Stock Co.*, 461 F. 2d 849, 851 (C. A. 8, 1972); *Rosen* v. *Public Service Electric & Gas Co.*, 409 F. 2d 775, 780 (C. A. 3, 1969) and 477 F. 2d 90, 94 (C. A. 3, 1973). A union also has broad powers to sue "in behalf of" employees under § 301(b) of the Labor Management Relations Act (29 U. S. C. 185(b)) which, unlike other provisions of the statute, does not exclude persons covered by the Railway Labor Act. A union also has capacity to sue without joining the employees it represents under several clauses of Rules 17(a) and (b) of the Federal Rules of Civil Procedure. See *International Union* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 700 (1966); 6 Wright and Miller, *Federal Practice and Procedure*, § 1552, pp. 689-91 (1971).

by union officers and the labor relations officers of the airlines in July 1971 (II Supp. App. 326). Copies of the labor contract with a notice explaining its binding effect went to the hundreds of terminated stewardesses in August 1971 (I *Id.* 41-52). Yet, as the union's *certiorari* petition explains (pp. 16-17), no objection was made to the union's authority until February 28, 1972.

In addition to the airlines' justified reliance on Railway Labor Act authority, the principle of apparent authority in the common law of agency provided the basis for a binding settlement. Apparent authority "results from a manifestation by a person that another is his agent, the manifestation being made to a third person"; and if it exists, "the third person has the same rights with reference to the principal as where the agent is authorized", 1 *Restatement of Agency,* 2d § 8, pp. 30-31 (1958). This principle is different from the doctrine of estoppel (*Id.* 32-3).

The reasonableness of the airlines' reliance on the union's authority is evident. The agent chosen by the stewardesses to act for them in their claims of an unlawful employment practice under Title VII was not an interloper but their statutory labor representative. The airlines were aware that the stewardesses had conflicting seniority interests, but that does not disqualify a labor representative under the Railway Labor Act. The reasonableness of the union's exercise of its authority was apparent because, with the actions brought as class actions under Rule 23, the required court approval of the settlement would give any employee an opportunity to litigate objections. It was reasonable of the airlines to negotiate with the union, as the statute required it to do. *Virginian Railway Co.*, 300 U. S. at 548.

II.

THE DECISION MISINTERPRETS RULE 23 IN HOLDING CLASS ACTIONS SHOULD HAVE BEEN BROUGHT UNDER SUBDIVISION (b)(3)

The Court of Appeals' holding that the class actions for terminated stewardesses were under Rule 23(b)(3) has two important results. Since (b)(3) class members must be given a notice to permit them to exclude themselves from the class* and since such a notice was not given, the judgment approving the settlement is a nullity under the Court of Appeals' ruling; and the settlement itself is nullified because the right of exclusion is contrary to the provision of the settlement that it is binding on all class members. This result destroys a disposition of the litigation by settlement years after it was made. As a precedent, the misapplication of Rule 23, treating a (b)(3) class as an exclusive alternative to (b)(1) and (b)(2) classes, will have far-reaching results in other cases. The Court of Appeals' (b)(3) classification and the resulting limitation on the binding effect of class action judgments are contrary to the language and purposes of Rule 23 and all relevant legal authority.

In its *certiorari* petition, the union accepts this Court of Appeals' ruling that the terminated stewardesses should have been in a (b)(3) class with a right of exclusion and implies (p. 17, n16) that the airlines were wholly responsible for treating the class as (b)(2) in the District Court. On the contrary, as the record makes clear,** the union and the other plain-

* Appendix D, p. A22, contains the text of Rule 23. Subdivision (c)(2), p. A23, requires a notice only in a (b)(3) class that permits a class member to exclude himself.

** Both complaints filed by the union and representative stewardesses alleged without ambiguity that the actions were brought "pursuant to Rule 23(b)(2)" (I Supp. App. 2, 8) with clear factual allegations for a (b)(2) class. The same allegations were made by objecting terminated stewardesses in independent litigation (Supp. Rec. 1; I Supp. App. 62, 63). The airlines' answers denied the class action allegations (I Supp. App. 12, 17; par. 4). Attorneys for the union and other plaintiffs approved in writing July 1971 orders that the actions were properly maintainable as class actions (I

tiffs treated the class as (b)(2) beginning with the filing of the litigation in August 1970. The union's contention, made in this Court for the first time, that the class is (b)(3) and that class members may exclude themselves is a repudiation of its lower court position that affected the entire course of the litigation.

A. Clear Language of Rule 23 Shows Class Actions Were Under Subdivision (b)(2) of Rule 23

The Court of Appeals' narrow application of Rule 23(b)(2) may seem superficially sound. In these Title VII actions the stewardesses sought remedies under § 706(g) which authorizes the District Court to "enjoin the respondent" from an unlawful employment practice and also "to order such affirmative action as may be appropriate, which may include reinstatement of hiring of employees, with or without back pay". The employed stewardesses were believed entitled to an injunction only, and subdivision (b)(2) was held applicable to them by the Court of Appeals.* Subdivision (b)(2) describes a (b)(2) class action as one in which the party opposing the class "has acted . . . on grounds generally applicable to the class", and then mentions the remedies for the conduct, "thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole". But subdivision (b)(2) was held not applicable to the terminated stewardesses because such a stewardess sought affirmative relief under § 706(g), "reinstatement, back pay and accrued seniority" that "would depend on facts peculiar to her" (p. A12). They were held within subdivision (b)(3), which applies when "questions of law or fact common to members of the class predominate over any

Id. 28-9); February 1972 notices to class members that they would request the court to find the action to be under Rule 23(b)(2) (I *Id.* 58, 59); and notices in July 1971 and February 1972 that the court had ruled the actions maintainable as class actions for terminated stewardesses with "final judgment . . . binding upon all members of the class" (I *Id.* pp. 30-31 and 55-56).

* Page A12.

questions affecting only one member". However, this interpretation is shown, on analysis, to be contrary to the intended meaning of Rule 23.

First, mandatory injunctions are overlooked by the Court of Appeals' interpretation. When subdivision (b)(2) refers to "appropriate final injunctive relief", it includes the affirmative remedies provided for in § 706(g). The very word "affirmative" used in § 706(g) is commonly used to describe the relief provided in a mandatory injunction. A mandatory injunction is granted when "some affirmative act or acts" are "essential to restore the status quo", § 16, 42 Am. Jr. 2d 745 (1969). The provisions for injunctions in Rule 65 of the Federal Rules of Civil Procedure include mandatory injunctions, although the word "mandatory" is not used in the rule. The same is true of a statute.* In a Title VII action the ordering of "such affirmative action as may be appropriate", including "reinstatement . . . with or without back pay" as provided in § 706(g) is thus within the description of the (b)(2) class as one where the party has acted against the class generally, "thereby making appropriate final injunctive relief . . . with respect to the class as a whole". The newest treatise on the federal rules says of this (b)(2) provision, "Injunctive relief embraces all forms of judicial orders, whether they be mandatory or prohibitory." 7A Wright & Miller, *Federal Practice and Procedure*, § 1775, p. 21 (1972).

* In *Porter* v. *Warner Co.*, 328 U. S. 395, 397 (1946), a statute forbidding the collection of rents in excess of a stated formula provided for "an order enjoining such acts or practice". It was held that affirmative relief was permitted in addition to the prohibition of future conduct. "Nothing is more clearly a part of a subject matter of a suit for an injunction than the recovery of that which has been illegally acquired . . ." To the same effect under the Civil Rights Act of 1957, see *State of Alabama* v. *United States*, 304 F. 2d 583, 590 (C. A. 5, 1962):

> "Mandatory injunctions affirmatively compelling the doing of some act, rather than merely negatively forbidding continuation of a course of conduct, are a traditional tool of equity . . . Certainly the order may command affirmative action where the enabling statute provides, as this one does, for the use of an injunction 'or other order' ".

Second, the language of Rule 23(b) as a whole indicates that the (b)(1) and (b)(2) classes are both within the description of the (b)(3) class and that subdivision (b)(3), the last alternative, does not apply if the class is within subdivision (b)(1) or (b)(2). Class (b)(1) is described as one in which the prosecution of separate actions would create a risk of inconsistent or varying adjudications that would establish "incompatible standards of conduct for the party opposing the class" or "adjudications with respect to individual members" that would "be dispositive of the interests of the other members not parties". The (b)(1) class, formed to avoid varied adjudication, and the (b)(2) class, in which an opponent's conduct is generally applicable to the class, are likely to be within the broader description of the (b)(3) class, *i.e.*, one in which (1) questions of law or fact common to members of the class must predominate over questions affecting only individual members and (2) the class action must be superior to other available methods of adjudicating the controversy fairly and efficiently. Whatever the class, the same relief is likely to be available, such as the prohibitory and affirmative remedies under § 706(g) of Title VII in the present case.

The correct reading of Rule 23(b) is thus clear. Subdivisions (b)(1), (b)(2), and (b)(3) overlap. When a class is within subdivisions (b)(1) or (b)(2), it is so treated; class members may not exclude themselves; and the final judgment is binding on the class members whether the judgment follows a contested trial or a settlement. If the class is not within subdivision (b)(1) or (b)(2), but is within the looser and broader subdivision (b)(3), the members may exclude themselves from the class but the judgment after a trial or settlement is binding on members who have not excluded themselves from the class.

The Court of Appeals uses the reverse of the required reasoning in applying the rule. Finding the class to be within (b)(3), it holds the class is therefore not within (b)(2). But the class is intended to be confined to (b)(2) even though it is also within

(b)(3). A wealth of authority shows the errors in the Court of Appeals' interpretation.

B. Authorities Are All Contrary to Court of Appeals' Interpretation

The court decisions are all one way, holding that, if an action is classifiable as (b)(3) as well as (b)(1) or (b)(2), it should be classified as (b)(1) or (b)(2). Decisions to that effect are cited in a footnote,* showing that this result achieves the purposes of Rule 23 "to avoid a multiplicity of suits, provide common binding adjudication, and prevent inconsistent or varying adjudications" (*Mungin*, 318 F. Supp. 730). In the pioneer decision (*Van Gemert*), Chief Judge Ryan perceived that "virtually every class action that meets the requirements of 23(b)(1) or 23(b)(2) will also meet the less severe requirements of 23(b)(3)"; and he added that "Rule 23(b)(3) is not applicable" where "the stricter requirements of 23(b)(1) and 23 (b)(2) are squarely presented by the plaintiffs' claims". This Court denied full review in two of the cases in 1971 (*Rodriguez, Mungin*). Two of the cases were Title VII class actions (*Jenkins, Robinson*), the Fourth Circuit saying in the latter that, since "the defendants' liability for back pay is rooted in grounds applicable to all members of the defined class", "the award of back pay, as one element of the equitable remedy, conflicts in no way with the limitations of Rule 23(b)(2)". The ruling of the Court of Appeals for the Seventh Circuit in the present cases is contrary to decisions of the Fourth (*Robinson*), Fifth (*Jenkins*), and Eighth (*Arkansas Education*) Circuits.

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* *Van Gemert* v. *Boeing Co.*, 259 F. Supp. 125, 130-1 (S. D. N. Y. 1966); *Jenkins* v. *United Gas Corp.*, 400 F. 2d 28, 34 (C. A. 5, 1968); *Rodriguez* v. *Swank*, 318 F. Supp. 289, 294-5 (3 judge court, N. D. Ill. 1970), aff'd. memo. op. 403 U. S. 901 (1971); *Mungin* v. *Florida East Coast R. Co.*, 318 F. Supp. 720, 730 (D. C. M. D. Fla. 1970), aff'd 441 F. 2d 728 (C. A. 5, 1971), *cert. den.* sub nom. *Howard* v. *Florida East Coast R. Co.*, 404 U. S. 897 (1971); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 801-2 (C. A. 4, 1971); *Arkansas Education Assn.* v. *Board of Education*, 446 F. 2d 763, 768 (C. A. 8, 1971); *Brandt* v. *Owens-Illinois, Inc.*, ... F. Supp. ..... CCH Fed. Securities L. Rep. ¶ 94,355 (S. D. N. Y. 1974).

In the notes on the 1966 amendments to the Federal Rules of Civil Procedure, this Court's Advisory Committee indicated the particular relevance of a (b)(2) class in a Title VII action. The committee's notes stated, citing seven Court of Appeals cases:

> "Illustrative [of subdivision (b)(2)] are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration". 39 F. R. D. 69, 102.

The comment on subdivision (b)(3) stated that "class-action treatment is not as clearly called for as in those described above [classes (b)(1) and (b)(2)], but it may nevertheless be convenient and desirable depending upon the particular facts" (*Id.*).

Professor Benjamin Kaplan, reporter to the Advisory Committee on the Federal Rules of Civil Procedure from 1960 to 1966, has explained why a class should be held (b)(1) or (2) rather than (b)(3) in order to forbid exclusion and make the judgment binding on all class members. *1966 Amendments of the Federal Rules of Civil Procedure (1)*, 81 Harv. L. Rev. 356, 375-400 (1967). Under the federal equity practice before the rules, the result in a class action was generally held binding on all class members.* The so-called "spurious" class action under the 1938 rule became "snarled" because class members "could remain outside the action if the determination were adverse to their interests and in that event they would not be bound" (p. 385). Under the 1966 amendments, Professor Kaplan noted, "It will be found that cases satisfying (b)(1) or (b)(2) will also pass muster under (b)(3)"; and then, citing Judge Ryan's *Van Gemert* opinion he added, "the cases should

*Professor Kaplan quoted Justice Story's statement in his treatise that the decree in a class action "will ordinarily be held binding upon all other persons standing in the same predicament, the Court taking care, that sufficient persons are before it, honestly, fairly and fully to ascertain and try the general right in contest", 81 Harv. L. Rev. at 377, n. 72.

then ordinarily be treated under the former provisions [(b)(1) or (2)] rather than the latter [(b)(3)]" (p. 390, n. 130).

To the same effect are the two great modern treatises on federal practice: 3B Moore's *Federal Practice*, ¶ 23.31[2]-[3], pp. 23-526, 527 (1969):

> "The three types of class suits are not always mutually exclusive. Indeed, at times there is much overlap. And while a class action of the third type may qualify less frequently as a type one or type two class suit; a class action that meets the requirements of either or both of the first two types may well satisfy the requirements of the third type."
>
> * * * * *
>
> "If an action can be maintained under (b)(1) and/or (b)(2), and also under (b)(3), the court should order that the suit be maintained as a class action under (b)(1) and or (b)(2), rather than under (b)(3), so that the judgment will have res judicata effect as to all the class (with no member having the right to opt out), and not defeat the policy underlying the (b)(1) and (b)(2) class suits".

7A Wright and Miller, *Federal Practice and Procedure*, § 1777, p. 49 (1972):

> "Since the common question standard of Rule 23(b)(3) is in some ways much less demanding than that of either Rule 23(b)(1) or Rule 23 (b)(2), actions that are maintainable under either of these provisions also frequently satisfy the requirements for subdivision (b)(3). However, . . . when a particular action qualifies under another portion of Rule 23(b) as well as Rule 23(b)(3), it should be treated as if it had been brought exclusively under the other provision. This will mean that the special procedural provisions applicable to Rule 23(b)(3) suits and the privilege to opt-out of the action should be operable only when the class action is maintainable under that subsection alone".

The Court of Appeals cites only one inconclusive opinion, and no other authority, for its holding that the terminated stewardesses must be in a (b)(3) class, *Gerstle* v. *Continental Airlines, Inc.*, 50 F. R. D. 213 (D. Colo., 1970). There an

airline stewardess brought a Title VII class action against her employer claiming sex discrimination and an unlawful discharge under an abandoned airline rule terminating stewardesses on marriage. In the cited report the District Court conditionally held the class action could be maintained, although the discussion of the class as (b)(3) in the opinion was not reflected in the order (p. 220). The class was said to be (b)(3) "in that the claim under Title VII is not only a common question in this case, it is the *predominant* question in the litigation" (p. 219, original emphasis).* The reason given for this 1970 statement in the *Gerstle* opinion was wholly illogical as a basis for a (b)(3) rather than a (b)(2) class because in a (b)(2) action the common questions also predominate over those affecting only individuals. The *Gerstle* opinion, as that of the Court of Appeals in the present case, mentioned none of the cases or other contrary authorities described above.

(C) Serious Effect on Decided Cases

The practical consequences of the Court of Appeals' error in its unique holding that a class is (b)(3), regardless of whether it is also (b)(1) or (b)(2), are far reaching. Almost every (b)(1) or (b)(2) class can be shown to be within subdivision (b)(3), but the right of exclusion on notice exists only in (b)(3) cases. For that reason, as Professors Wright and Miller say, the privilege to opt-out "should be operable only when the class action is maintainable under that subsection [(b)(3)] alone". The Court of Appeals' contrary holding opens the door to widespread direct and collateral attacks on (b)(2) class action judgments in all kinds of cases, a much

* There was no mention of the possible application of subdivision (b)(2). Later the class was "declassified" when it appeared to consist of only 14 members, as shown in the later report of the same case, 466 F. 2d 1374 (C. A. 10, 1972). The litigation was finally dismissed on the merits, for failure to prove that the alleged sex discrimination was the cause of the discharge of the two plaintiffs, as held in the still later report of the same case, 358 F. Supp. 545 (D. C. Colo. 1973).

wider field than Title VII litigation. The decision will permit class members in a disposed of (b)(1) or (b)(2) case to seek to vacate a prior judgment on the ground that the class was properly (b)(3), that exclusion notices were not given, and that the judgment is not binding. And without direct attack of this kind, class members disappointed with a (b)(2) class action judgment are enabled by the Court of Appeals' ruling to sue on their own account and defeat the plea of *res judicata* on the same ground. See Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589 (Jan. 1974).

CONCLUSION.

For the foregoing reasons, this Court is urged to issue a Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit as prayed.

Respectfully submitted,

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March 1974.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1973 SEPTEMBER SESSION, 1973

Nos. 72-1336, 72-1503
AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO et al.,
Plaintiffs,
v.
AMERICAN AIRLINES, INC.,
Defendant,
DARLENE PRESTON, et al.,
Appellants in No. 72-1336,
BONNIE PULSKAMP, et al.,
Appellants in No. 72-1503.

No. 72-1335
AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO et al.,
Plaintiffs,
v.
TRANSWORLD AIRLINES, INC.,
Defendant,
PATRICIA A. SANTINI, et al.,
Appellants.

No. 72-1399
DARLENE PRESTON, et al.,
Plaintiffs-Appellants,
v.
AMERICAN AIRLINES, INC., et al.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
J. SAM PERRY,
Judge.
70 C 2069

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
J. SAM PERRY,
Judge.
70 C 2071

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
J. SAM PERRY,
Judge.
72 C 498

ARGUED SEPTEMBER 11, 1973—DECIDED DECEMBER 21, 1973

Before KILEY, FAIRCHILD, and STEVENS, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* These appeals form a sequel to *Air Lines Stewards, etc., Loc. 550* v. *American Airlines, Inc.*, 455 F. 2d 101 (7th Cir., 1972), and some of the background facts appear there. That decision, affirming denial of intervention by EEOC, was filed January 18, 1972. Thereafter notices of hearing in the district court on approval of the settlement, referred to at 455 F. 2d 103, were mailed to members of the class in each action. A hearing was held. Plaintiff union (ALSSA) and the defendants supported the settlement, and the support of several individual members of the class was made known. Objections on behalf of dissatisfied members of the classes, including several named individual plaintiffs, were filed or made known at the hearing.

On March 17, 1972, a judgment was entered in each action (American Airlines, Inc., and Trans World Airlines, Inc., being the respective defendants), approving the settlement, ordering it implemented, and dismissing the action on the merits. Appeals were filed by members of the classes, including certain named plaintiffs, in each case. A related action against American and ALSSA was also dismissed, and those plaintiffs appealed.

Appellants contend that the district court should not have approved the settlements because ALSSA (certified bargaining agent for airlines cabin attendants under the Railway Labor Act), which negotiated the settlements disposing of the interests of members of the class, had interests antagonistic to them. Appellants also maintain that they were entitled to exclude themselves from the action and avoid the binding effects of the judgments. Other arguments are urged in addition.

Until October, 1970, defendant airlines followed the practice of discharging, permanently, a stewardess who became pregnant. On August 18, 1970, ALSSA and 12 stewardesses who had lost their jobs under this policy commenced an action against American challenging this practice as unlawful sex discrimination, in violation of 42 U. S. C. § 2000e, et seq. The complaint asserted that the action was within Rule 23(b)(2), F. R. Civ. P., and

that the class consisted of all present and former American stewardesses employed at any time since July 2, 1965, the effective date of the Civil Rights Act of 1964, who had been, desired to be, or would in the future desire to be, pregnant. The complaint sought declaratory, injunctive, and monetary relief. On the the same day, ALSSA and five individuals filed a similar action against TWA.

Counsel for ALSSA signed the complaint as attorney for the plaintiffs and conducted the litigation and negotiations for settlement. He did not consult the individual plaintiffs nor any other members of the class concerning the terms of settlement.

By October, 1970, ALSSA and the airlines had made collective bargaining agreements which eliminated the challenged practice prospectively. Thus, although the class defined by the complaints included currently employed stewardesses who, presumably, had an interest in the declaratory and injunctive relief sought, that segment of the class had little further interest in the action, except for such interest as the junior among them would have adverse to the reinstatement of previously discharged stewardesses. Since the currently employed stewardesses were more actively the constitutents of ALSSA, the change of circumstances made ALSSA at least a less adequate representative of the remaining members of the class than it may have been considered for the entire original class.

In July, 1971, counsel agreed on a settlement, subject to court approval. The proposed terms required discharged stewardesses who desired re-employment to notify the airline within 60 days from court approval. They would then be placed on a preferential hiring list, to be employed to fill vacancies before others were hired. When offered a job, a stewardess must accept within 10 days and meet specified standards of physical condition. The airline would have no liability whatsoever to any stewardess who failed, timely, to give the notice of desire to be re-employed or notice of acceptance of an offer. If re-employed, the stewardess would start with the same seniority as she had

up to the date of termination, in the case of TWA, or that seniority plus 90 days additional in the case of American. Under the agreement, an order would be entered defining the class, in each case, as all former stewardesses who were removed from the payroll because of pregnancy, between July 2, 1965 and July 31, 1969, in the case of TWA, and August 11, 1970, in the case of American. If approved the settlement and resulting judgment, would bind all members of the class.

It does not appear that the district court made any order concerning the maintenance of these actions as class actions, pursuant to Rule 23(c)(1), until July 16, 1971, after the settlement had been proposed. On that date, the court ordered that the class in each action be redefined in accordance with the settlement agreement, and that the action be maintained as a class action. The order did not expressly address the fulfillment of the prerequisites listed in Rule 23(a) nor of any additional requirement of Rule 23(b). Presumably the court did not consider (b)(3) applicable, as it did not order a notice pursuant to (c)(2).[1] Notices of hearing on approval of the settlement were

1. Rule 23(b)(3) provides:

"An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . .

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Rule 23(c)(2) provides:

"(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual

sent out, both in July, after which the hearing was delayed by the appeal, and again the next February.[2]

At or before the March, 1972, hearing on approval of the settlement, opposition to it was manifested by some of the named plaintiffs and by other members of the class in each action. With some variations, the objectors wanted all, or more nearly all, of the "whole loaf", i.e., reinstatement with seniority accrued to date, and back pay. Several members of the American class, the appellants here in No. 72-1503, had brought their own action July 14, 1971 in the Central District of California. They had attempted to opt out of the instant action, their California action, meanwhile, having been stayed. The district court heard objecting plaintiffs and class members, and their attorneys, only in the capacity of objectors, and in effect recognized ALSSA as the sole representative plaintiff, representing all class members, including the individual named plaintiffs.

The judgments entered as a result of the hearings determined that "Plaintiffs", without distinguishing between ALSSA and other plaintiffs, are adequate representatives of the class and have adequately represented them; that the action is a Rule 23(b)(2) class action;[3] that the judgment is binding on all members of

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notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

2. Rule 23(e) requires a notice to class members of a proposed settlement. The appellants contest the adequacy and accuracy of the notice procedures used here. In light of our disposition of the balance of the case, we do not reach this issue.

3. Rule 23(b)(2) provides:
"An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . .

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or . . . ."

the class; and that the settlement is fair, reasonable, and adequate for all.

On February 28, 1972, Darlene Preston, a plaintiff in the action against American, above referred to, had brought a new class action against American and ALSSA predicated upon a claim of unlawful discrimination similar to that in the earlier complaint, and upon a claim that ALSSA failed to fulfill its duty of fair representation. Judgment was entered March 20, 1972 dismissing the complaint, apparently on the ground that the claims had been adjudicated by the judgment of March 17, 1972.

1. *ALSSA's Representation of the Class.*

Mr. Feldman, counsel for ALSSA, and attorney of record for all the plaintiffs, testified in support of the settlement.

He took into consideration the proposition that the answer to the ultimate question of liability, common to all members of the class, i.e., whether the discharge policy was a violation of the Act, was less than a certainty. He felt that about 90% of the members of the class faced a serious legal question as to recovery because they had been terminated long before any complaint was filed with EEOC and these stewardesses might not be able to rely on the later filing by other members of the class. He noted that the circumstances of termination varied and that these differences might raise questions concerning recovery by members of the class. The airlines had terminated some on the ground of pregnancy, and others on the ground that they had concealed pregnancy, in violation of a company rule. Others had voluntarily resigned after becoming pregnant, and others resigned, but claimed they were coerced.

Mr. Feldman testified that ALSSA made the decision to agree to the settlement. One advantage was that it afforded an opportunity to every member of the class to return to work, including those against whom the statute of limitations defense might have been urged, as well as those whose claim did not have that problem; those whose termination had clearly been

grounded on pregnancy, as well as those who had less clearly been terminated for that cause.

Mr. Feldman conceded that ALSSA had obligations to groups which had conflicting interests. Junior currently employed stewardesses would be harmed by immediate reinstatement of former stewardesses, and the settlement did not provide such reinstatement. Seniority has a very important effect on stewardesses' trip assignments and the like. Thus the former stewardesses who were reemployed pursuant to the settlement would want seniority to accrue during the period they had been out of the job, but the greater the seniority awarded to them, the larger the number of currently employed stewardesses who would be put to disadvantage. Mr. Feldman testified that the extent of seniority agreed on represented a compromise of the interests of the various groups.

The airlines said they were unwilling to negotiate concerning back pay. Mr. Feldman conceded that if the matter were litigated and liability established, there would probably be individual members of the class who could establish back pay claims. He estimated that full litigation would consume about five years. ALSSA decided to subordinate the interest of those who wanted to recover money to the interest of those who desired to return to work. This, he said, was an example of bargaining agent responsibility, to resolve in good faith the conflict in interest between groups, both of which are represented by the union.

Rule 23(a)(3) requires that the claims of a representative plaintiff be typical of the claims of the class and (4) requires that the representative plaintiff will fairly and adequately protect the interests of the class. It has been indicated "that the reasons for requiring an individual plaintiff in a class action to be a member of the class do not necessarily preclude an association from representing a class where its *raison d'etre* is to represent the interest of that class."[4] It seems clear, however, that unless

4. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, 937 (2d Cir., 1968).

ALSSA's status as certified bargaining agent under the Railway Labor Act alters the situation, it cannot, under the circumstances, be treated as the equivalent of a group of former stewardesses terminated on account of pregnancy, and thus members of and adequate representatives of, the class.

ALSSA admittedly considered and to some extent protected the interests of the currently employed stewardesses in working out the settlement. They, who are presently presumably in control of ALSSA, are not members of the class as now defined, and they have antagonistic interests. In *Hansberry* v. *Lee*, 311 U. S. 32, 45 (1940), the Supreme Court held that a judgment in a class action can only bind absent class members where the representative's interests coincide with those of the balance of the class.

Counsel for ALSSA apparently would concede that if ALSSA were deemed merely an association of presently employed stewardesses, or even of both presently and formerly employed stewardesses, it would not be deemed an adequate representative of the class. Counsel argues, however, that ALSSA's role as an exclusive collective bargaining agent for the stewardesses employed by these airlines gives it the power to accommodate and adjust the rights of present and former stewardesses which spring from Title VII, subject only to its obligation of fair representation. If this position were adopted, it need only be shown that ALSSA acted in good faith and in a manner which could be deemed fair, in making the choices involved in the settlement. Approval of the settlement could then be set aside only if the findings of good faith and fairness were found clearly erroneous.

In *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192, 200 (1944), the Supreme Court held that the Railway Labor Act, in requiring the carrier to bargain with the chosen representative, operated to exclude any other representative, and deprived minority members of the craft of the right to choose a different representative or to bargain individually as to mat-

ters which are properly the subject of collective bargaining. It follows that the representative may make contracts having unfavorable effects on some of those represented, but the representative has "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." A similar holding was reached under the National Labor Relations Act in *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 336 (1953).

In *Humphrey* v. *Moore*, 375 U. S. 335 (1963), the Supreme Court dealt with challenges to the resolution of grievances pursuant to a multi-party collective bargaining agreement. At p. 349, the Court said, concerning the antagonistic interests of two groups, that "both groups [were] represented by the same union, whose president supported one group and opposed the other at the hearing before the Joint Conference Committee. But we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another."

In *Vaca* v. *Sipes*, 386 U. S. 171 (1967), a union member who had been discharged sued the union for its refusal to take the grievance to arbitration under the collective bargaining agreement. The Supreme Court found no evidence of personal hostility or bad faith on the part of the union officers, and set aside a verdict in favor of the plaintiff. "Having concluded that the individual employee has no absolute right to have his grievance arbitrated under the collective bargaining agreement at issue, and that a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious, we must conclude that that duty was not breached here." p. 194.

Counsel suggests that accommodation of the Railway Labor Act with Title VII of the Civil Rights Act of 1964 requires that the collective bargaining representative be accorded the

same power and held to the same degree of duty as the cases just cited accord it in the formulation and administration of collective bargaining agreements and the rights of individual employees thereunder. We are unable to agree.

Title VII, unlike the National Labor Relations Act and Railway Labor Act, does not create nor necessarily recognize powers of exclusive representation, either for those currently employed in the unit nor for a group which would include those claiming to have been unlawfully discharged. The situation is not parallel, and it does not seem to us that policy reasons militate in favor of similar status for the bargaining representative. An individual who claims to have been the victim of unlawful discrimination has the right to redress individually, whether the discrimination was an isolated act or a general practice.

> "The real party in interest in conciliation endeavors is the employee alleged to have been discriminatorily treated. He is completely free to accept or reject the proposals of union or employer as well as the position taken by the [Equal Employment Opportunities] Commission." *Air Lines Stewards, etc. Loc. 550* v. *American Airlines, Inc.*, 455 F. 2d 101, 106 (7th Cir., 1972).

Surely the fact that a labor organization is defined in 42 U. S. C. § 2000e and made a potential defendant in unlawful employment practice cases does not, as counsel seems to suggest, indicate an intention on the part of Congress that a collective bargaining representative play a special role in Title VII actions to redress unlawful employment practices by an employer.

We think a union may serve its members by being plaintiff in a suit to vindicate their civil rights. "There is nothing in the law which precluded the Union from recognizing the injustice done to a substantial minority of its members and from moving to correct it." *Bowe* v. *Colgate-Palmolive Company*, 416 F. 2d 711, 719 (7th Cir., 1969). When it espouses the interest of one group of its members, it doubtless has an obligation of fairness to any members whose interests are in conflict. But

except for the area of collective bargaining and its necessary incidents, the union has no unique authority to compromise the rights of its members. Its adequacy as a representative party in a class suit, and its authority to compromise the rights of its members in a class suit when such rights do not arise out of collective bargaining agreements are to be tested and judged in the ordinary way.[5]

2. *The Right of Class Members to Exclude Themselves from the Actions Originally Brought.*

Appellants argue that the district court must offer the members of the class the opportunity to "opt out", or exclude themselves from the class. Rule 23(c)(2) requires that such opportunity, and an alternative opportunity to enter an appearance through counsel, must be afforded in any class action maintained under Rule 23(b)(3). Unless a class action is maintained under Rule 23(b)(3), no right to opt out exists. All members of the class are bound by the judgment.

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5. See *Cook County College Teachers U., Loc. 1600, A. F. T.* v. *Byrd*, 456 F. 2d 882, 885 (7th Cir., 1972); *Mungin* v. *Florida East Coast Ry. Co.*, 318 F. Supp. 720 (M. D. Fla., 1970), aff'd 441 F. 2d 728 (5th Cir., 1971), *cert. denied* 404 U. S. 897; *Amalgamated Meat Cutters of No. Am.* v. *Safeway Stores, Inc.*, 52 F. R. D. 373, 375 (D. Kan., 1971). *Amalgamated Meat Cutters* is similar to the present case. There, certain of the defendant's female employees and their union filed a class action alleging that the defendant had failed to pay men and women the same wage for the same work, a violation of 42 U. S. C. § 2000e-5(e). The union and the employer negotiated a compromise and sought the court's approval under rule 23(e). Certain of the class members, including one of the individual named plaintiffs, objected to the compromise as unfair. The district court refused to approve the settlement and ordered independent counsel appointed for the dissenting class members. The court observed that:

> "However, counsel for the plaintiffs has appeared in a dual capacity—that is, both the Union's attorney and attorney for the Class members. It is apparent from the communications in the file, as well as the expressions in open court, that the interests of the Union as a plaintiff, and the interests of at least a portion of the members of the Class are in conflict and not identical." 52 F. R. D. at 375.

On July 16, 1971, when the first orders dealing with the actions as class actions were entered, the court did not expressly address the question whether or not they fell under Rule 23 (b)(3). In the judgments, the court held they fell under Rule 23(b)(2), thus foreclosing the opportunity of any member of the class to exclude herself.

Rule 23(b)(2) applies to class actions in which

> "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ."

When these actions were filed, the class included both stewardesses who had been terminated for pregnancy and those who might in the future be terminated for that cause. The latter were primarily, perhaps solely, interested in a declaration that the practice of termination for that reason is unlawful and an injunction against it. As to that group, (b)(2) would clearly be applicable.

Subdivision (b)(3) applies where:

> "the court finds that the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fair and efficient adjudication of the controversy."

All the stewardesses share the common question of whether the discharge-for-pregnancy policy was lawful. Those who had already been discharged were interested in reinstatement with or without back pay, and assuming a favorable decision on the common question, the entitlement of any particular former stewardess to reinstatement, back pay, and accrued seniority would depend on the facts peculiar to her. The amount of back pay would be computed separately for each, and reduced by her interim earnings.[6] Mr. Feldman's testimony shows other

6. 42 U. S. C. § 2000e-5(g).

differences among individual cases. Some who had not filed with EEOC might have difficulty in establishing that right to rely on the filings of others. The manner and stated cause of termination of employment varied.

As to the discharged stewardesses, the class actions would, even at the beginning, have had to be maintained under (b)(3), with each such stewardess having the right to exclude herself, or appear through counsel.

When the airlines ended their discharge policy, the actions became virtually moot as far as the currently employed stewardesses were concerned, and purely prospective relief against the practice became of little moment. The (b)(3) character of the actions, while always present as to the discharged stewardesses, became even more obvious.

In *Gerstle* v. *Continental Airlines, Inc.*, 50 F. R. D. 213 (D. Colo., 1970), a former stewardess brought a class action, seeking injunctive relief, back pay, and reinstatement for stewardesses terminated because of marriage. The airline had dropped the policy after terminating plaintiff. The court held that in view of the change in policy there was no case for injunctive relief, but that the action should proceed under (b)(3) as to the other types of relief. The present actions are similar.

We have no doubt that even in a class action subject to (b)(3), situations could arise where individual members of a class so clearly acquiesced in and accepted the efforts of their union or other plaintiff for so long a period and under such circumstances that they would be estopped from exercising their right to exclude themselves and "spoiling" a settlement obtained by such efforts. Nothing revealed in this record puts these cases in that posture.

The actions originally brought against the two airlines should have been, and should henceforth be treated as (b)(3) class actions with the attendant right of a class member, for a reasonable interval, to exclude herself or appear through counsel pursuant to Rule 23(c)(2).

3. *Remand of the Actions Originally Brought Against the Two Airlines.*

On remand, the district court should:

(1) Permit one or more of the named plaintiffs or other members of the class in each action to replace ALSSA as the representative of the class. If it should appear desirable for adequate representation of all class members, subclasses, each with its own representative, may be created.

(2) Require that notices, pursuant to Rule 23(c)(2) be sent, offering to each member of the class the opportunity to exclude herself from the class or appear through counsel.

(3) Proceed with the litigation unless settlement as to some or all issues is agreed on by the appropriate parties, and approved, on notice, by the court.

4. *The Preston Action Brought in February, 1972.*

We express no conclusions with respect to this action except that, since it was dismissed on the theory that the claims therein had been adjudicated by a judgment now being reversed, the judgment dismissing it should also be reversed.

The judgments appealed from are reversed and the causes remanded for further proceedings consistent with this opinion. Circuit Rule 23 shall apply on remand.

APPENDIX B

EXCERPTS FROM RAILWAY LABOR ACT

(May 20, 1926, ch. 347, 44 Stat. 577 as amended, 45 U. S. C. 151 et seq., 1964 Edition)

§ 151. Definitions

When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

* * * * *

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

* * * * *

This chapter may be cited as the "Railway Labor Act" (May 20, 1926 ch. 347, § 1, 44 Stat. 577).

* * * * *

§ 151a. General Purposes

The purposes of the chapter are: . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. (May 20, 1926, ch. 347, § 2, 44 Stat. 577; June 21, 1934, ch. 691, § 2, 48 Stat. 1186).

§ 152. General duties

First. Duty of carriers and employees to settle disputes.

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and main-

tain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives.

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * *

Fourth. Organization and collective bargaining; . . .

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. . . (May 20, 1926, ch. 347, § 2, 44 Stat. 577 . . .)

* * * * *

§ 181. Application of sections 151, 152, and 154-163 to carriers by air.

All of the provisions of sections 151, 152, and 154-163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service. (May 20, 1926, ch. 347, § 201 as added Apr. 10, 1936, ch. 166, 49 Stat. 1189).

APPENDIX C

EXCERPTS FROM TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY, CIVIL RIGHTS ACT OF 1964.

Public Law 88-352, 78 Stat. 253, ff.; 42 U. S. C. § 2000e et seq.*
(1972 Amendments Not Included)

[255] Discrimination Because of Race, Color, Religion, Sex, or National Origin

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any [256] way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

* * * * *

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular [256] business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

[259] Prevention of Unlawful Employment Practices

SEC. 706. (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

* * * * *

(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency

has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such [261] an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff

would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible [261] for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

APPENDIX D

RULE 23, FEDERAL RULES OF CIVIL PROCEDURE

CLASS ACTIONS.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action

maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.